Supreme Court, U. S.
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No. 79-1846

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
AND THE STATE OF NEW HAMPSHIRE,
APPELLANTS

*v.*

F. RAY MARSHALL,
SECRETARY OF LABOR, AND THE
UNITED STATES DEPARTMENT OF LABOR

---

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

---

## MOTION TO DISMISS

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WADE H. MCCREE, JR.
*Solicitor General*

M. CARR FERGUSON
*Assistant Attorney General*

LEONARD J. HENZKE, JR.
ROBERT T. DUFFY
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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## MOTION TO DISMISS

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### QUESTIONS PRESENTED

1. Whether the Secretary of Labor correctly concluded that New Hampshire's unemployment compensation law fails to conform to the requirements of the Federal Unemployment Tax Act.

2. Whether Congress may condition the availability of certain federal unemployment tax credits and grants of money upon the state's provision of unemployment compensation coverage for the employees of the state and its political subdivisions.

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Pursuant to Rule 16 of the Rules of this Court, the Solicitor General, on behalf of the appellees, moves that the appeal be dismissed.

## OPINIONS BELOW

The opinion of the court of appeals (J.S. App.) is reported at 616 F.2d 240. The decision of the Secretary of Labor (J.S. App.) is unreported. The recommended decision of the administrative law judge, which is incorporated by reference in substantial part in the decision of the Secretary, is not reported (App. C, *infra*, 5a–52a).

## JURISDICTION

The decree of the court of appeals was entered on February 20, 1980 (App. B, *infra*, 3a–4a). The notice of appeal was filed on May 21, 1980 (App. D, *infra*, 53a–55a).[1] The jurisdictional statement was filed on May 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

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[1] The appendix to the jurisdictional statement does not include the court of appeals' corrections to its opinion, the decree of the court of appeals, the recommended opinion of the administrative law judge, or the notice of appeal. We have therefore set forth those items reproduced as Appendices A, B, C, and D, *infra*. Moreover, because the appendix to the jurisdictional statement is not paginated, our references to the documents included in that appendix are to such documents as separately paginated.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The relevant provisions of the Internal Revenue Code (26 U.S.C.) are set forth in J.S. App.

## STATEMENT

This case arises under the Federal Unemployment Tax Act of 1954 ("FUTA"), Sections 3301 through 3311 (26 U.S.C.) (J.S. App.). The statutory provisions at issue in this case operate as follows: Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds to conform to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31st. The certification of the Secretary of Labor is the prerequisite for tax credits for private employers subject to the state law and federal grants of money.

Section 3301 presently imposes a tax on most private employers equal to 3.4% of the first $6,000 of wages paid to each employee.[2] In turn, Section 3302

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[2] See 26 U.S.C. 3301(1) and 3306(b)(1).

permits the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[3] This credit may not exceed 2.7% of such wages.[4] In any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is certified as provided in section 3304* * *" (26 U.S.C. 3302(a)(1)). Thus, if the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year.

An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[5] The second type of grant is for the administration of public employment offices, which provide, for example, job finding, placement and recruiting services.[6]

Section 115 of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94–566, 90 Stat. 2670–2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Statutes Involved 10–14, 27–28) to require, as a condition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same

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[3] 26 U.S.C. 3302(a)(1).

[4] See 26 U.S.C. 3302(a)(1), (c), and (d)(1).

[5] See Sections 301–303 of the Social Security Act, 42 U.S.C. 501–503.

[6] See Sections 1–12 of the Wagner-Peyser Act, ch. 49, 48 Stat. 113–117, 29 U.S.C. 49–49k.

terms and conditions as state law covers private employees. These amendments apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 90 Stat. 2671.

By letters dated February 24, 1978, the Secretary notified the Governor of New Hampshire and the Commissioner of the New Hampshire Department of Employment Security that he had serious questions as to whether New Hampshire's Unemployment Compensation Law, 2-D N.H. Rev. Stat. Ann. ch. 282 (1977 repl. ed.), conformed to the federal requirements set forth in Code Section 3304(a). A hearing on those questions was held on September 14 and 15, 1978, in Washington, D.C., before an administrative law judge.

Six requirements of Section 3304(a) were in dispute. All of these requirements for certification had been added to FUTA by the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667. The six issues, which relate to the 12-month period ending October 31, 1978, were as follows:[7]

1. Whether the New Hampshire Unemployment Compensation Law extended coverage to the employees of the State and its political subdivisions. See Sections 3304(a)(6)(A), 3309(a) (1) and 3306(c)(7).

2. Whether New Hampshire extended coverage to employees of non-profit schools which are not institutions of higher learning. See Sections 3304(a)(6)(A), 3309(a)(1) and 3306(c)(8).

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[7] See App. C, *infra*, 7a-12a.

3. Whether New Hampshire granted political subdivisions the option of reimbursing the state for unemployment benefits paid to their former employees, in lieu of making contributions to the state in the manner of private employers. See Sections 3304(a)(6)(B) and 3309(a)(2);

4. Whether New Hampshire provided for the determination of the eligibility of aliens for benefits by requiring data with respect to alien status uniformly from all applicants for benefits and by basing determinations of alien status upon a preponderance of the evidence. See Section 3304(a)(14)(B) and (C).

5. Whether, contrary to FUTA, New Hampshire permitted benefits to be paid to certain professional athletes during the period between sports seasons. See Section 3304(a)(13).

6. Whether New Hampshire provided for benefits for employees of educational institutions between academic years or terms, and during vacation periods or recesses. See Section 3304(a)(6)(A).

In addition to the foregoing six issues concerning conformity with FUTA, New Hampshire claimed that Congress could not constitutionally condition the availability of the tax credits and grants on a state's providing unemployment compensation coverage for state and local government employees.[8]

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[8]Only the first of the FUTA conformity issues directly implicated this constitutional question; also, the third disputed conformity requirement (the option of local governments to reim-

The administrative law judge found that New Hampshire's unemployment compensation law did not satisfy the FUTA requirements in each of the six respects urged by the Department of Labor. He also made findings of fact respecting the constitutional question. However, he did not rule on the constitutionality of the federal statute because he had no authority to do so (App. C, *infra*, 12a–13a).

On October 30, 1978, the Secretary issued his decision. He upheld the administrative law judge on the FUTA conformity issues, finding that "the New Hampshire Unemployment Compensation Law fails to conform to the provisions of the Federal Unemployment Tax Act, as amended, with respect to each of the six numbered issues * * * listed in the Notice of Hearing * * *." The Secretary also found that the findings of fact bearing on the constitutional question were supported by the evidence, and, with certain modifications, the Secretary adopted such findings (Decision 26–27).

On New Hampshire's appeal, the court of appeals sustained the Secretary's decision.[9] New Hampshire conceded in the court of appeals that its unemployment compensation law did not conform to the six FUTA requirements (Opinion 6–7). After review of the evidence respecting those requirements, the court upheld the Secretary's decisions "that New Hampshire's Un-

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burse the state fund) would become moot if the constitutional issue were resolved in favor of the state.

[9]The court of appeals granted a stay of the Secretary's decision, "pending resolution of the petition for review." That stay expired upon entry of the court's judgment.

employment Compensation law was in the six respects specified not in conformity with the requirements of the implicated 1976 amendments to FUTA" (Opinion 7–9). Although the court noted that, at most, only two of the six conformity issues implicated New Hampshire's Tenth Amendment issue, it nevertheless addressed the constitutional question. Following *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), the court ruled that the FUTA tax credits are not coercive but are a legitimate condition for federal funding. As the court stated (Opinion 14), "Congress has relied on the attraction of the federal purse to persuade the states that it is in their best interests to conform to a national unemployment insurance program." The court concluded that the 1976 Amendments to FUTA were not barred by either the Tenth Amendment or this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), because the states are not compelled to participate in the federal benefits program (Opinion 13–15).

## ARGUMENT

1. This appeal should be dismissed for lack of jurisdiction. The applicable jurisdictional statute, 26 U.S.C. 3310(c),[10] provides: "The judgment of the court [of appeals] shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the

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[10] See, generally, S. Rep. No. 91–752, 91st Cong., 2d Sess. 6, 26, 54 (1970). Under Section 3310, moreover, only the state is entitled to seek review. The Department of Employment Security, an autonomous agency, is not.

United States Code." There is accordingly no right of appeal under Section 3310(c).

Nor is appeal authorized under 28 U.S.C. 1254(2). That provision allows an appeal only where a state statute is held "to be invalid as repugnant to the Constitution, treaties or laws of the United States." The court below did not so rule. All that the decision in this case holds is that New Hampshire's unemployment compensation law does not satisfy the conditions for availability of federal credits and grants that are set forth in Section 3304(a), and that such conditions are constitutional. New Hampshire therefore has no right of appeal under 28 U.S.C. 1254(2).

2. Treating the appeal as a petition for a writ of certiorari (28 U.S.C. 2103), the petition should be denied. The only issue that appellants present for review is the constitutionality of the requirement of FUTA that New Hampshire provide unemployment coverage to state and local government employees as a condition for participation in the federal tax credit and benefit programs. But four of the six conformity issues resolved against New Hampshire do not even implicate the Tenth Amendment. Thus, even if the constitutional issue were resolved in appellants' favor, the Secretary's denial of certification would be upheld on independent statutory grounds.

3. The court of appeals correctly rejected appellants' Tenth Amendment challenge to the 1976 Amendments to the Federal Unemployment Tax Act. Its reasoning was recently adopted by the District of Columbia Circuit in a case raising the same constitutional objection. *County of Los Angeles* v. *Marshall*, Nos. 77–2138,

78–1142, 78–1232, 78–1275 and 78–1311 (Mar. 19, 1980), petition for certiorari pending,[11] No. 79–1965.

a. The enactment in 1935 of the Social Security Act established the federal-state unemployment compensation system. The basic statutory system was described in this Court's decision in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), which upheld its constitutionality under Article I, Section 8, the Due Process Clause, and the Tenth Amendment of the Constitution. The basic system remains in effect today.

Stripped to its essentials, appellants' suit attempts to resuscitate the FUTA tax coercion question that was resolved by the Court in *Steward Machine Co.* There, the Court held (301 U.S. at 585) that the FUTA tax "is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." Petitioners advance the identical arguments rejected in *Steward Machine Co.* For example, the employer in that case argued that the FUTA tax was only a "pretext to provide this plan for unemployment," and was a "tax club * * * sufficient to drive the States into line"; that "Congress was not seeking taxes for the Treasury * * * [but] was providing a plan for unemployment," and that the states were coerced because otherwise "their citizens are compelled to supply millions of dollars to be used for the administration of agencies in other States that submit." (Summary from petitioner's brief, 301 U.S. at 551–553.)

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[11] Because of the similarity in subject matter, we are serving upon Appellants a copy of our brief in opposition in that case.

But in *Steward Machine Co.*, the Court rejected the argument that the purpose of the statute was "to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government" (301 U.S. at 587). Appellants' identical argument that the FUTA is unconstitutionally coercive is therefore foreclosed by *Steward Machine Co.*[12] As the Court observed, in terms that govern this case as well (301 U.S. at 589–590; citation omitted):

> The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." * * * In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that

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[12] *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), upon which appellants rely (J.S. 29), does not support their claim. There, the Court held that a New Hampshire income tax violated the Privileges and Immunities Clause because it was imposed only on nonresidents who worked within the state. Nothing in that case bears upon the constitutionality of a federal tax, such as FUTA, which is uniformly applied in all states.

such a concept can ever be applied with fitness to the relations between state and nation.[13]

In *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525–526 (1937), decided the same Term as *Steward Machine Co.*, the Court similarly upheld the constitutionality of the Unemployment Compensation Act of Alabama, stating that the federal unemployment compensation program "is not coercive in its operation."[14] Finally, as recently as two Terms ago, the Court described the current national unemployment scheme as "federal involvement primarily through *tax incentives* to encourage state-run programs" (emphasis supplied). *New York Tel. Co.* v. *New York Labor Dep't*, 440 U.S. 519, 537, n.28 (1979) (quoting from *Ohio Bureau* of Employment Services v. *Hodory*, 431 U.S. 471, 483 (1977)).

It is therefore settled beyond serious question that the FUTA credit does not operate coercively upon the states. In so arguing, we do not suggest that the credit, and the several other substantial benefits to the

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[13]The FUTA tax credit was modeled after the former federal estate tax credit (up to 80% of the federal tax) for payment of state inheritance taxes. S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935). The Court upheld that credit against the charge that it coerced Florida into enacting an inheritance tax and injured that State by inducing potential taxpayers to withdraw property from the State. *Florida* v. *Mellon*, 273 U.S. 12, 17–18 (1927). Cf. Section 2011 of the Internal Revenue Code of 1954 (26 U.S.C.).

[14]See also *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306, 310 (1943), noting that the federal unemployment tax "from the nature of its ninety per cent credit device, is obviously an invitation to the states to enter the field of unemployment insurance."

states that arise from participation in the federal-state unemployment compensation system,[15] do not present an attractive incentive. A tax credit that diverts billions of dollars of federal revenue to the states may be too attractive to decline. That fact, however, does not create an unconstitutional coercion. Tax incentives do not become penalties simply by reason of their attractiveness.

b. Nor is there any unconstitutional coercion involved in the provisions of the 1976 Amendments to FUTA that require unemployment coverage for state and local government employees as a condition for receiving the tax credits and grants. These conditions were enacted for the same compelling economic and social reasons that gave rise to the original federal unemployment legislation in the 1930's, *viz.*, the need to relieve the burdens of unemployment. The conditions at issue thus stand on the same footing as the state requirements imposed in the original federal unemployment compensation program upheld in *Steward Machine Co.* and *Southern Coal Co.*

The court of appeals therefore correctly concluded that the 1976 Amendments represent Congress' determination that coverage of state and local government employees is an "end legitimately national,"[16] an essential means for combating the national economic, fiscal, and social consequences of unemployment (Opinion 11–14). By 1976, 7.7 million state and local

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[15] See *State of New Hampshire Dep't of Employment Security* v. *Marshall*, *supra*, 616 F.2d at 246–247 n.10.

[16] See *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. at 590–591.

government workers did not have unemployment coverage. These employees constituted the largest group of workers not covered by the regular system.[17] Two years earlier Congress had established the Special Unemployment Assistance Program,[18] which provided unemployment benefits for individuals generally not covered under state laws. Congress fully funded this program, and thereby provided hundreds of millions of dollars of direct federal grants to unemployed state and local government employees.[19]

In addition to these special benefits, Congress has expended additional hundreds of millions of dollars under the regular FUTA program to assist state governments. For example, in fiscal 1977 alone, the federal government paid more than $1.5 billion in direct grants to states for the administration of unemployment compensation programs and local public employment offices.[20] As of February 1, 1978, moreover, more than $4.9 billion in interest-free federal loans to states, for payment of unemployment benefits, were outstanding.[21]

Given these substantial federal grants both to state governments and unemployed state and local govern-

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[17] S. Rep. No. 94-1265, 94th Cong., 2d Sess. 8 (1976).

[18] Emergency Jobs and Unemployment Assistance Act of 1974, Title II, Pub. L. No. 93-567, 88 Stat. 1845, 1850.

[19] See H.R. Rep. No. 93-1528, 93d Cong., 2d Sess. (1974).

[20] *Dep'ts of Labor and Health, Education, and Welfare Appropriations for 1979: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 2d Sess. (Pt. 1) 191 (1978) (hereinafter "*House Hearings*").

[21] *House Hearings, supra*, at 168-169.

ment employees, there is no basis for petitioners' contention that the statutory condition requiring the extension of unemployment coverage to state and local government workers is an unrelated federal charge upon the state or its citizens, or is an impermissible federal regulation of the states. The federal government has spent billions of dollars in a federal-state cooperative program to combat unemployment. State coverage of state and local government workers is necessary to the success of that program, and a reasonable condition for participation in the program's enormous federal benefits.

c. Since the Federal Unemployment Tax Act is not a federal mandate imposed upon the states, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), has no bearing upon this case. *National League of Cities* involved the mandatory extension of federal minimum wage and maximum hour requirements to employees of state and local governments. The Court held that these mandatory requirements abridged the Tenth Amendment rights of the states. As the Court stated (426 U.S. at 852; footnote omitted): "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl.3." Thus, *National League of Cities* addresses only the use of the federal commerce power[22] "to directly displace" traditional state

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[22]This Court confined the rationale of *National League of Cities* to Commerce Clause powers. It stated (426 U.S. at 852 n.17):

government functions. It has no application to federal programs undertaken, at the option of the states, in response to federal incentives. A state either may accept the federal conditions, and thereby receive the statutory benefits, or it may decline to participate. An unbroken line of decisions of this Court has held such "conditional" federal benefit statutes to be constitutional. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 143–144 (1947).[23]

The foregoing analysis was recently upheld in *State of North Carolina ex rel Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd, 435 U.S. 962 (1978). That case involved federal assistance to North Carolina under 42 health assistance programs. A principal requirement for such assistance was that the state establish a health agency to administer a certificate of need program for new institutional health services. But North Carolina's highest court had ruled that, under the state constitution, a certificate of need statute was beyond the power of the state legislature. Accordingly, North Carolina challenged such a requirement as an unconstitutionally coercive effort to require the state to amend its con-

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We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

[23] See also *City of New York* v. *Richardson*, 473 F.2d 923, 928 (2d Cir.), cert. denied, 412 U.S. 950 (1973).

stitution. The three-judge district court rejected the argument, ruling that the requirement was a condition of federal assistance, and therefore was not coercive. As the court stated (445 F. Supp. at 535–536): "It must be remembered that this Act is not compulsory on the State. Unlike the legislation faulted in *State of Maryland* v. *Environmental Protection Ag., supra,* 530 F.2d at 215, it does not impose a mandatory requirement to enact legislation on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance" (emphasis in original).[24]

## CONCLUSION

The appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, it is respectfully submitted that the petition should be denied.

WADE H. MCCREE, JR.
*Solicitor General*
M. CARR FERGUSON
*Assistant Attorney General*
LEONARD J. HENZKE, JR.
ROBERT T. DUFFY
*Attorneys*

AUGUST 1980

[24]The court also distinguished (445 F. Supp. at 536 n.10) *National League of Cities* on the ground that it involved both direct regulation of the states and the Commerce Clause.

## APPENDIX A

**OFFICE OF THE CLERK**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

Dana H. Gallup
Clerk

1602 John W. McCormack
Post Office and Courthouse
Boston, Mass. 02109
(617) 223-2888

March 10, 1980

To West Publishing Company, Commerce Clearing House, National Center for Automated Information Retrieval, Lawyers Weekly, and All Counsel

Re: 78-1564 State of New Hampshire Department of Employment Security, et al. v. The Honorable F. Ray Marshall, Secretary of Labor of the United States, and The United States Department of Labor

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Gentlemen:

Please make the following corrections in the above captioned opinion which was released on February 20, 1980.

On page 12, footnote 8, last line, the word "employees" should be changed to, "employers."

On page 13, footnote 10, eight lines from the top, the figure "$9,000,000" should be changed to "$900,000,000."

Very truly yours,
DANA H. GALLUP, CLERK.
By /s/
FRANCIS P. SCIGLIANO
*Chief Deputy Clerk*

FPS: mn

---

cc: Edward F. Smith, General Counsel, 32 South Main Street, Concord, NH

Charles S. Rhyne, Esq. 1000 Connecticut Ave., N.W. Suite 800, Wash., DC 20036

James E. Morris, Asst. Att. Gen., State House Annex, Room 208, 25 Capitol St., Concord, NH 03301

M. Carr Ferguson, Tax Division, Dept. of Justice, Washington, DC

George Kaufmann, 2101 L St., N.W., 10th Fl., Washington, DC 20037

Gerald C. Tobin, Office of Gen. Counsel, US Catholic Conference, Inc., 1312 Mass. Ave., N.W., Washington, DC 20005

Ms. Janet Kohn, 1211 Conn. Ave., N.W., Washington, DC 20036

## APPENDIX B

### UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 78-1564.

STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., PETITIONERS,

*v.*

THE HONORABLE F. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES; AND THE UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS.

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### DECREE
**Entered February 20, 1980**

This cause came on to be heard upon petition for review of the decision of the Secretary of Labor of the United States

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for review is denied, and

The order of this Court dismissing Los Angeles County as a named petitioner in this case is reaffirmed for lack of jurisdiction under 28 U.S.C. Sec. 3310(a).

By the Court:

/s/ _____

DANA H. GALLUP
*Clerk*

A True Copy

Attest

/s/_____

DANA H. GALLUP
*Clerk*

[Cert. cc: Secretary of Labor, and Messrs. Smith, Rhyne, Tobin, Kaufmann, Morris, Kohn and Ferguson.]

## APPENDIX C

**U.S. DEPARTMENT OF LABOR**
**Office of Administrative Law Judges**
**Suite 700-1111 20th Street, N.W.**
**Washington, D.C. 20036**

In the Matter of

U.S. DEPARTMENT OF LABOR

*v.*

STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY

**CONFORMITY PROCEEDINGS**

CHARLES RAYMOND, ESQ.
Ellen Beard, ESQ.
*Office of the Solicitor*
*U.S. Department of Labor*
*Suite N-2101*
*200 Constitution Avenue, N.W.*
*Washington, D.C. 20210*
*For the Department of Labor*

EDWARD SMITH
PAUL KENNEALLY
*New Hampshire Department of Employment Security*

JAMES MORRIS
*Assistant Attorney General*
*State of New Hampshire*

CHARLES RHYNE, ESQ.
WILLIAM RHYNE, ESQ.
STEVEN ELMENDORF, ESQ.
MARTIN MATZEN, ESQ.
*Suite 800*
*1000 Connecticut Avenue, N.W.*
*Washington, D.C. 20036*
*For the State of New Hampshire*

U.S. CATHOLIC CONFERENCE
MS. MARY MULLANY
*Office of the General Counsel*
*1312 Massachusetts Avenue, N.W.*
*Washington, D.C. 20005*

AFL-CIO
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO
GEORGE KAUFMAN
*2101 L Street, N.W.*
*Washington, D.C. 20037*

Before: ROBERT G. MAHONY
*Administrative Law Judge*

**RECOMMENDED DECISION**

Pursuant to a Notice of Hearing issued by the Secretary of Labor on June 15, 1978 the State of New Hampshire Department of Employment Security (NHDES) was afforded the opportunity for a hearing on the general question of whether the State of New Hampshire has amended its Unemployment Compensation Law: (1) so that it contains, effective January 1, 1978, each of the provisions required to be contained therein by reason of the enactment of the Unemployment Compensation Amendments of 1976 (Public Law 94-566, approved October 20, 1976; 90 Stat. 2667, *et seq.*) and Title III of the Emergency Unemployment Compensation Extension Act of 1977 (Public Law 95-19, approved April 12, 1977; 91 Stat. 39, 43, *et seq.*); and (2) so that it no longer contains the provisions specified in section 3304(a) of the Internal Revenue Code of 1954, 26 U.S.C. 3304(a). The purpose of these amendments is to extend Unemployment Com-

pensation Insurance coverage to employees of states and political subdivisions and certain other employees.

The Unemployment Compensation Law of the State of New Hampshire must be determined by the Secretary of Labor, by October 31, 1978, to be in conformity with the requirements of the Federal Unemployment Tax Act (FUTA) in order to be certified under section 3304(c) of FUTA and thereby to have that State receive the benefits for itself and its inhabitants provided by Title III of the Social Security Act, 42 U.S.C. 501–504, and FUTA.

The hearing was originally set for July 13, 1978. At the request of NHDES, it was continued until July 27, 1978 by the Administrative Law Judge. It was again rescheduled by the Secretary at the request of NHDES until September 14, 1978 at which time the parties were afforded the opportunity to examine witnesses and introduce documentary evidence. Timely briefs, proposed findings of fact and conclusions of law, have been filed by the parties.

*Issues*

The issues to be decided in this case as set out in the Notice of Hearing are:

1. Whether, in view of the exemptions from coverage in sections 282:1,H(4)(g) and 282:1,H,(4)(q) of the New Hampshire Unemployment Compensation Law, the New Hampshire law has been amended so that services performed in the employ of the State of New Hampshire and in the employ of its political subdivisions are covered by the New Hampshire law, effective January 1, 1978, as is required by sections

3304(a)(6)(A) and 3309(a)(1) of the Internal Revenue Code of 1954, as amended by section 115 of Public Law 94-566.

2. Whether, in view of RSA 282:1,H(4)(s)(3), which provides for an exemption from coverage of services performed in the employ of a nonprofit school which is not an institution of higher education, the New Hampshire Unemployment Compensation Law has been amended to cover such services, effective January 1, 1978, as is required by sections 3304(a)(6)(A) and 3309(a)(1) of the Internal Revenue Code of 1954, as amended by section 115 of Public Law 94-566.

3. Whether the New Hampshire Unemployment Compensation Law has been amended, effective January 1, 1978, to conform with the requirements of sections 3304(a)(6)(B) and 3309(a)(2) of the Internal Revenue Code of 1954, as amended by section 506 of P.L. 94-566 and Section 302 of P.L. 95-19 (relating to an option to elect to make payments in lieu of contributions) with respect to governmental entities and nonprofit organizations which are required by section 3304(a)(6)(A) and 3309(a)(1) of such Code to be covered by the New Hampshire law.

4. Whether, in view of the provisions of RSA 282:1,N,(1)(a), and/or the provisions of RSA 282:1,O, which exclude from the definition of wages amounts paid to any alien unless such person was, at the time he performed services present in the United States under code of law, the New Hampshire Unemployment Compensation Law has been amended so that it contains the provisions required to be contained therein by section 3304(a)(14) of the Internal Revenue Code of

1954, as enacted by section 314 of P.L. 94-566 and amended by section 302 of P.L. 95-19, and so that it no longer contains the provisions required by section 3304(a)(9)(A) of such Code, as enacted by section 121 of P.L. 91-373, in the following respects:

(a) Whether such law has been amended effective January 1, 1978, so that it contains the provisions required to be contained therein by section 3304(a)(14) of the Internal Revenue Code of 1954 (relating to denial of compensation to aliens other than specified classes of aliens and establishing certain standards to procedure and weight of evidence sufficient to support denial of compensation), since the State law provisions do not contain standards of procedure or weight of evidence to be used in applying the provisions, as is required by section 3304(a)(14)(B) and (C) of such Code; and

(b) Whether such law has been amended, effective January 1, 1978, so that it no longer contains the provisions required by section 3304(a)(9)(A) of the Internal Revenue Code of 1954 (relating to denial or reduction of compensation to an individual solely because he filed a claim in another State, or a contiguous country with which the United States has an agreement with respect to unemployment compensation, or because he resides in another State or such contiguous country at the time he files a claim for unemployment compensation), since the State law provides for the denial of or reduction in compensation to such an individual because he files a claim for compensation in a contiguous country with which the United States has an agreement with respect to unemployment compensation or

because he resides in such a contiguous country at the time he files a claim for compensation.

5. Whether section 282:1,O of the New Hampshire Unemployment Compensation Law, which provides for the disregard of wages earned in training, preparation to participate or participation, in sports or athletic events, has been amended, effective January 1, 1978, so that it contains the provisions required by section 3304(a)(13) of the Internal Revenue Code of 1954, as enacted by section 314 of P.L. 94-566 (which provides that compensation shall not be payable on the basis of services substantially all of which consist of participating in sports or preparing or training to so participate for any week which commences between sport seasons or similar periods under specified conditions) in the following respect: Whether RSA 282:1,O authorizes or requires the use of wages to establish a claim based upon services intended to be excluded by virture of the substantiality test of section 3304(a)(13).

6. Whether section 282:3,F of the New Hampshire Unemployment Compensation Law, which requires the denial of compensation to any school employee in any week in which the educational institution is on a break if such person has a contract to perform or a reasonable assurance that after the break he will perform professional or nonprofessional service in any such institution, has been amended so that it conforms with section 3304(a)(6)(A) of the Internal Revenue Code of 1954, as amended by section 104(a) of P.L. 91-373, section 115 of P.L. 94-566, and section 302 of P.L. 95-19, in the following respects:

(a) Whether such law, which has been amended so as to contain for the period prior to January 1, 1978, a provision which denies compensation to individuals performing services in the employ of nonprofit and State institutions of higher education in capacities other than professional (i.e., instructional, research, or principal administrative capacities) between successive and non-successive academic years or terms, and which denies compensation to individuals performing services in either professional to other than professional capacities during a period when such institutions of higher education are not in session, no longer contains for such period the provisions required by section 3304(a)(6)(A) of such Code;

(b) Whether, with respect to section 3304(a)(6)(A) and clauses (i) and (ii) of such Code, as amended by section 115 of P.L. 94-566 and section 302 of P.L. 95-19, the New Hampshire law has been amended effective January 1, 1978, so that it no longer contains the provisions required by subparagraph (A) and clause (i) or so that it contains provisions which do not conform to subparagraph (A) and clause (ii) because of: (1) denial of compensation to employees of institutions of higher education performing services in capacities other than professional (i.e., instructional, research, or principal administrative capacities); (2) denial of compensation to employees of educational institutions when they move from professional to other than professional employment, and vice versa; and (3) denial of compensation to other than professional employees of educational institutions during non-successive academic years and/or terms; and

(c) Whether, with respect to section 3304(a)(6)(A) and clause (iii) of such Code, as enacted by section 302 of P.L. 95–19, the New Hampshire law has been amended effective January 1, 1978, so that it contains provisions which do not conform to subparagraph (A) and clause (iii) because of: (1) denial of compensation to employees of educational institutions during a period other than an established and customary vacation period of holiday recess; and (2) denial of compensation to individuals who perform services in other than an professional capacity in the employ of an institution of higher education.

In addition to introducing evidence in the above conformity issues, the parties, under the Rules of Procedure for this case, were also afforded the opportunity to introduce evidence on the issue of the constitutionality *vel non* of the 1976 amendments to FUTA.

The New Hampshire Department of Employment Security maintains that the Secretary and the Administrative Law Judge as his designee must make conclusions of law on constitutional issues. This position is based upon the revised Rules of Procedure which were issued on August 15, 1978 setting the hearing date for September 14, 1978. The original Rules of Procedure stated *inter alia* " . . . no conclusion of law regarding the constitutionality or unconstitutionality of any Federal statute(s) are to be made . . ." This language, in essence, was omitted in the revised Rules. Since the omission was obviously the result of a typographical error, in the revised Rules of Procedure, I do not deem it material to the conduct of these proceedings so as to permit NHDES to validly claim prejudice or sur-

prise. This omission was corrected by the Secretary on September 14, 1978 (43 F.R. 42048, September 19, 1978). In any event, it is settled that neither the Secretary nor his designee may decide constitutional issues. *Oestereich* v. *Selective Service Board* 393 U.S. 233, 242 (1968). (Harlan, J., concurring). Therefore, since the Rules of Procedure permit evidence bearing on the constitutionality of the 1976 Amendments, and, since the parties have offered such evidence, findings of fact but no conclusions of law will be made on these issues.

Based upon my review of the entire record in this case, including my observation of the witnesses as well as the briefs and proposed findings of fact and conclusions of law, I make the following:

*Finding of Fact and Conclusions of Law on the Issues of Conformity*

1. From on or about October 21, 1976 thru on or January 24, 1978, the U.S. Department of Labor and State of New Hampshire Department of Employment Security engaged in communications, orally and in writing which concerned Amendments to the New Hampshire Unemployment Compensation law to make it conform to FUTA.

2. By letter dated October 5, 1977 from Luis Sepulveda, Regional Administrator for Employment and Training, to Mr. Benjamin C. Adams, Commissioner, NHDES, NHDES was advised of seven items that DOL found deficient in proposed legislation (HB 1143) to implement P.L. 94-566. Those items were described as (1) coverage of governmental entities, (2)

exculsion from coverage of governmental entities, (3) financing option of political subdivisions, (4) coverage of nonprofit elementary and secondary schools, (5) denial of benefits to athletes, (6) between terms denial, and, (7) denial of benefits to aliens. NHDES was further advised that corrective amendments had to be enacted by January 1, 1978, and, if not, the Secretary of Labor is required, pursuant to Section 3304(c) of FUTA to notify the Governor that there is reason to believe the state will not be certified for tax credit. NHDES was advised that if corrective legislation is not enacted in 1977, it will be necessary for the Secretary to issue by January 31, 1978 a notice of opportunity for hearing to the agency, pursuant to section 3304(c) of the FUTA. The hearing would be on the question of whether the State has failed to amend its law so that it contains each of the provisions, required by reason of the enactment of the Unemployment Compensation Amendments of 1976, to be included therein.

3. NHDES did not respond to the DOL letter of October 5, 1978.

4. The Secretary of Labor, by letter dated February 24, 1978 advised NHDES that he had serious questions as to whether the State of New Hampshire has amended its Unemployment Compensation Law so that it contains each of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 (P.L. 94-566) and Title III of the Emergency Unemployment Compensation Extension Act of 1977 (P.L. 95-19) to be included therein. NHDES was also advised that the Secretary had seri-

ous questions as to whether the State of New Hampshire has amended its law so that it no longer contains each of the provisions required by reason of the enactment of Public Law 91–373 to be included therein.

5. The Secretary advised that the basis for questions as to whether the State law contains provisions, required by Public Law 94–566, Public Law 95–19, and Public Law 91–373, as conditions for credit against the Federal unemployment tax, could be identified as follows:

1. (a) The New Hampshire Unemployment Compensation Law does not provide for coverage of all services performed in the employ of the State and its political subdivisions, effective on January 1, 1978, as required by sections 3304(a)(6)(A) and 3309(a)(1), FUTA.

(b) The State law does not contain specific authorization effective on January 1, 1978, allowing governmental entities to elect to finance unemployment benefit costs either by paying contributions or by reimbursing the State unemployment Fund for benefits paid, as required by sections 3304(a)(6)(B) and 3309(a)(2), FUTA.

(c) The State law does not provide for coverage, effective on January 1, 1978, of services performed for nonprofit schools which are not institutions of higher education, as required by sections 3304(a)(6)(A) and 3309(a)(1), FUTA.

(d) The State law does not provide for denial of unemployment benefits, effective on January 1, 1978, to certain aliens under circumstances described in subparagraph (A) of section 3304(a)(14), FUTA, or contain the provision specified in subparagraphs (B) and (C) of section 3304(a)(14). The

State law does not ensure, on the other hand, that benefits will not be reduced or denied a claimant solely because he filed a claim or resides in another State or Canada, as required by section 3304(a)(9)(A), FUTA.

(e) The State law permits the use of wages earned in non-sport services beginning January 1, 1978, as the basis for paying benefits to a professional athlete during the off-season without regard to whether substantially all the individual's services were performed in sport activities, contrary to the requirement of Section 3304(a)(13), FUTA.

(f) The State law provides for denial of benefits, effective July 1, 1977, to employees of educational institutions in circumstances under which section 3304(a)(6)(A), FUTA, requires that such individuals be paid benefits under the same terms and conditions that apply to other workers.

6. By letter dated June 6, 1978, the Secretary again advised NHDES *inter alia* of areas of alleged deficiencies of the New Hampshire Unemployment law in order to conform to P.L. 94–566.

7. The Secretary of Labor issued a formal Notice of Hearing and Rulings of Procedure to govern this proceeding on June 13, 1978 (43 F.R. 26500, June 20, 1978. Revised rules were published on August 18, 1978 (42 F.R. 36721) in order to accommodate a postponement of the hearing date requested by NHDES; a correction to the Revised Rules was published September 19, 1978 (43 F.R. 42048).

*Coverage of Public Employees Under Existing New Hampshire Law*

8. Since 1957, the State of New Hampshire has provided full unemployment insurance coverage for its

permanent classified civil service employees; State employees not covered are temporary and seasonal workers, as well as those few not in classified service.

9. Data submitted by NHDES shows that as of January 1, 1978, all but 2,370 of the State's 15,600 employees were covered by unemployment insurance. Those employees excluded from coverage were in classes of employment for which there is no expectation of permanency.

10. All employees of State hospitals and institutions of higher education have been covered since 1972 in conformance with Federal requirements of P.L. No. 91–373.

11. Since 1957, New Hampshire law has permitted local governments to elect to cover their employees. Only one such local government, the City of Dover, so elected as to a selected group of its employees.

12. Despite the availability of elective coverage by local governments under State law, employees of local governments have not sought the benefit of such coverage in the course of collective bargaining and negotiation.

13. The present New Hampshire public sector unemployment compensation program has provided unemployment benefits to permanent employees without forcing New Hampshire's unemployment program into the debt.

14. Of the 33,218 employees of New Hampshire local governments in October 1977, only some 702 employees of the City of Dover were covered under the State's unemployment compensation program.

15. The 1976 Amendments require that the States extend unemployment insurance coverage to virtually all employees of State and local government, on the same terms and conditions as coverage is provided to employees of employers in the private sector.

16. Failure of a State to amend its law to provide the public employee coverage required to conform with the 1976 Amendments would result in the State's private employers losing the FUTA tax credit and having to pay FUTA taxes at a rate of 3.4%. None of these revenues could be used in support of the nonconforming State's private sector unemployment compensation program.

17. Such a loss of the FUTA tax credit would be retroactive to the beginning of the applicable year, here 1978.

18. To conform with the 1976 Amendments, the States must also forward all monies paid by State and local governments as employers toward financing of unemployment insurance coverage to the Secretary of the Treasury immediately upon receipt.

a. Such monies may not be retained and invested by officers of the State.

b. Instead, such monies must be retained, disbursed, and invested in securities of the United States by the Secretary of the Treasury in accordance with Federal Law.

*Findings as to Conformity of New Hampshire Law to Federal Requirements*

19. Sections 3304(a)(6)(A), 3309(a)(1), and 3306(c)(7) of FUTA, when read together, require a state to cover for benefit purposes, effective January 1, 1978, state

and political subdivision employees, with certain limited exceptions stated in sections 3309(b) and 3306(c), under its state unemployment compensation law. The NHUCL has not been amended to provide this coverage effective on January 1, 1978, since sections 282:1, H(4)(g) and (q) of the NHUCL exclude from the definition of "employment" service performed in the employ of (1) political subdivisions (absent an election of coverage pursuant to section 282:7), and (2) the state (if the individual is not a classified employee in the state classified service) except with respect to services performed in the employ of a state hospital and/or an institution of higher education, and since an individual's entitlement to benefits under the NHUCL is based upon such person's annual earnings in "employment" (RSA 282:1,O).

20. Sections 3304(a)(6)(A), 3309(a)(1)(A) and 3306(c)(8) of FUTA, when read together, require a state to cover for benefit purposes, effective January 1, 1978, employees of nonprofit schools below the level of institutions of higher education under its state unemployment compensation law. The NHUCL has not been amended effective January 1, 1978, to provide this coverage since section 282:1,H(4)(s)(3) of the NHUCL expressly excludes from the definition of "employment" service performed in the employ of a school which is not an institution of higher education, and since an individual's entitlement to benefits under the NHUCL is based upon his annual earnings in "employment" (RSA 282:1,O).

21. Sections 3304(a)(6)(B) and 3309(a)(2), when read together, require that a state unemployment compen-

sation law must, effective January 1, 1978, at minimum, afford the governmental entities (which are required by § 3304(a)(6)(A) to be covered by the state unemployment compensation law) the option of electing to pay contributions or to make payments in lieu of contributions (i.e., reimbursements). The NHUCL has not been amended, effective January 1, 1978, to offer such choice to governmental entities. Section 282:6, A–2 of the NHUCL applies only to political subdivisions electing coverage.

22. The NHUCL has not been amended, effective January 1, 1978, to conform to the requirements of section 3304(a)(14)(B) and/or (C) of FUTA since NHUCL:

(a) does not expressly provide for the uniform collection form all applicants for compensation of any data or information required of individuals applying for compensation to determine whether compensation is not payable to them because of their alien status;

(b) the NHUCL does not expressly provide that in the case of an individual whose application for compensation would otherwise be approved, no determination by the state agency that compensation of such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence.

23. Section 282:1,O of the NHUCL is not in conformity with the requirements of § 3304(a)(13) of FUTA since the state law permits the use of non-sport wages with respect to a weekly benefit amount during the period between sport seasons even though the sport services constitute substantially all of the services performed by the individual during his base period.

Section 3304(a)(13) requires that a state unemployment compensation law provide, effective January 1, 1978, that under such circumstances compensation shall not be payable to such individual on the basis of any services.

23(a) Clause (i) of the currently effective section 3304(a)(6)(A) of FUTA requires the denial of benefits "between terms" to employees of educational institutions who performed services in a *professional* capacity (i.e., instructional, research, or principal administrative capacity) under certain conditions, but only if they have a contract or a reasonable assurance to perform service in any such professional capacity in the second such academic year or term. Similarly, clause (ii) of § 3304(a)(6)(A) provides that compensation may be denied "between terms" to employees of academic institutions (other than institutions of higher education) who perform services in a non-professional capacity (i.e., any capacity other than instructional, research, or principal administrative) under certain conditions, but only if they have a reasonable assurance to perform any such non-professional services in the second such academic year or term.

23(b) The NHUCL does not conform to the requirements of § 3304(a)(6)(A)(i) and (ii) for the reason that it denies benefits between school years when an employee of an educational institution performs service in a professional capacity in the first academic year or term or other period and has a contract or reasonable assurance to perform services in a non-professional capacity in the second academic year or term or other period, and vice versa. Clauses (i) and

(ii) limit application of the denials thereunder respectively to the performance of professional services in both academic years or terms and to the performance of nonprofessional services in both academic years or terms.

23(c) Further, the NHUCL does not conform to § 3304(a)(6)(A) of FUTA for the reason that clause (ii) of § 3304(a)(6)(A) authorizes, at the option of the State, the denial of benefits to non-professional employees of lower educational institutions only between successive academic years of terms. The NHUCL, in contrast, does not limit "between terms" denial of benefits to non-professional employees to the period between successive academic years to terms.

23(d) Still another reason why the NHUCL does not conform to § 3304(a)(6)(A) is that clause (ii) of § 3304(a)(6)(A) does not authorize "between terms" denial of benefits to non-professionals in institutions of higher education, whereas § 282:3,F of the NHUCL provides for a "between terms" denial to such persons.

23(e) Additionally, the NHUCL does not conform to the requirements of clause (iii) of § 3304(a)(6)(A) of FUTA since that section permits, at the option of a state, denial of benefits under certain specified conditions, on the basis of services described in clauses (i) and (ii), "for any week which commences during an established and customary vacation period or holiday recess. . ." The New Hampshire law, however, at § 282:3,F, provides for a denial of benefits "any other time" during which a school or other academic institution is not in session, between two successive academic years or terms or any other period," and is not, by its

terms, limited to periods specified in the federal law provision. Moreover, FUTA § 3304(a)(6)(A)(iii) does not apply to non-professional employees of institutions of higher education, whereas the New Hampshire provision does so apply.

*Conclusions of Law on the Issues of Conformity*

1. Pursuant to the provision of 26 U.S.C. 3304(c), the Secretary of Labor has provided the State of New Hampshire with an opportunity for hearing on the issues set out in the Notice of Hearing, dated June 15, 1978.

2. In relevant part, section 3304(a)(6)(A) of FUTA requires an approved State law, effective January 1, 1978, to provide that

> (6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law. . . .

2(a) Section 3309(a)(1) of FUTA, in relevant part, provides:

> (a) *State Law Requirements.*—For purposes of section 3304(a)(6)
>
> (1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are
>
> (B) Service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c). . .

Section 3306(c)(7) of FUTA provide:

> (7) Service performed in the employ of a State, or any political subdivision thereof, or any instru-

> mentality of any one or more of the foregoing which is wholly owned by one or more States of political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301.

2(b) The NHUCL has not been amended to provide this coverage effective on January 1, 1978.

2(c) Although the definition of "employing unit" in section 282:1,F of the NHUCL includes the state or any political subdivision or instrumentality thereof, sections 282:1, H(4)(g) and (q) of that law provide:

> (4) The term "employment" shall not include:
>
> (g) Service performed in the employ of any state other than this state or of any of the political subdivisions of such other state, or of any town, city or other political subdivision of this state unless such town, city or other political subdivision of this state elects to become subject under section 7 of this chapter; . . .
>
> (q) Service performed for this state by an individual who is not a classified employee in the state classified service; except that this provision shall not apply to service performed by an individual in the employ of a state hospital and/or an institution of higher education;

2(d) Since sections 282:1,H(4)(g) and (q) of the NHUCL exclude from the definition of "employment" service performed in the employ of (1) political subdivisions (absent an election of coverage pursuant to section 282:7), and (2) the State (if the individual is not

a classified employee in the State classified service) except with respect to services performed in the employ of a State hospital and/or an institution of higher education, and since an individual's entitlement to benefits under the NHUCL is based upon such person's annual earnings in "employment", it follows that the NHUCL does not provide the coverage of all the services required by § 3304(a)(6)(A) of FUTA.

3. Section 3304(a)(6)(A) of FUTA has been set out above. Section 3309(a)(1)(A) of FUTA provides:

> (a) *State Law Requirements.*—For purposes of section 3304(a)(6)—
>
> (1) except as otherwise provided in subsections (b) and (c), the service to which this paragraph applies are—
>
> (A) service excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c).

3(a) Section 3306(c)(8) of FUTA provides:

> (8) Service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

3(b) Read together, these three sections of FUTA require a state to extend benefits, as of January 1, 1978, to employees of non-profit schools below the level of institutions of higher education under its State unemployment compensation law. The NHUCL has not been amended, effective January 1, 1978, to provide this coverage in that section 282:1,H(4)(s) thereof, provides:

> (4) The term "employment" shall not include:

(5) The following services performed in the employ of an organization described in section 501(c)(3) and except under section 501(a) of the Internal Revenue Code:

(3) in the employ of a school which is not an institution of higher education . . .

3(c) Since section 282:1,H(4)(s)(3) of the NHUCL expressly excludes from the definition of "employment" service performed in the employ of a school which is not an institution of higher education, and since an individual's entitlement to benefits under the NHUCL is based upon his annual earnings in "employment", the NHUCL has not been amended to provide the coverage of services required by §§ 3304(a)(6)(A) of FUTA.

4. Section 3304(a)(6)(B) of FUTA requires an approved State law, effective January 1, 1978, to provide that

(6)(B) payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in Section 3309(a)(2);

4(a) Section 3309(a)(2) provides that for the purposes of section 3304(a)(6)—

(2) the State law shall provide that a governmental entity or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by state law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation at-

> tributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

4(b) These provisions clearly require that a State unemployment compensation law must (effective January 1, 1978), at the minimum, afford the governmental entities (which are required by sections 3304(a)(b)(A) to be covered by the State unemployment compensation law) the option of electing to pay contributions or make payments in lieu of contributions (i.e., reimbursements). The NHUCL has not been amended, effective January 1, 1978, to offer such choice to governmental entities. Section 282:6, A–2 of the NHUCL provides, in pertinent part:

> A–2. PAYMENT OF CONTRIBUTIONS BY TOWN, CITY OR OTHER POLITICAL SUBDIVISIONS
>
> Any town, city or other political subdivision of this state which has been elected under the provisions of subsection C of section 7 of this chapter to become subject to this chapter shall pay into the unemployment compensation fund an amount equivalent to the amount of benefits paid to claimants who during the applicable base period were paid wages by such town, city or other political subdivision . . .

4(c) Since the above quoted section applies only to political subdivisions electing coverage (as was required by section 3304(a)(12) prior to amendment by P.L. 94–566), no provision of the NHUCL provides the benefit financing options required by sections 3304(a)(6)(B) and 3309(a)(2) of FUTA.

5. Section 3304(a)(14) of FUTA requires an approved State law, effective January 1, 1978, to provide that:

> (14)(A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing [*sic*] the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) of section 212(d)(5) of the Immigration and Nationality Act),
>
> (B) any data or information required of individuals applying for compensation to determine whether compensation is not payable to them because of their alien status shall be uniformly required from all applicants for compensation, and
>
> (C) in the case of an individual whose application for compensation would otherwise be approved, no determination by the State agency that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence.

5(a) The NHUCL has not been amended to include provisions in conformity with the above quoted requirements of § 3304(a)(14)(B) and (C) of FUTA effective January 1, 1978, in the following respects.

5(b) The NHUCL does not expressly provide for the uniform collection from all applicants for compensation of any data or information required of individuals applying for compensation to determine whether com-

pensation is not payable to them because of their alien status as required by § 3304(a)(14)(B) of FUTA.

5(c) In addition, the NHUCL does not expressly provide that in the case of an individual whose application for compensation would otherwise be approved, no determination by the State agency that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence, as required by section 3304(a)(14)(C) of FUTA.

5(d) Section 3304(a)(9)(A) of FUTA required an approved State law, effective January 1, 1972, to provide that:

> (9)(A) compensation shall not [*sic*] denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation;

5(e) Section 282:1,N(1)(a) of the NHUCL provides that the term "wages" shall not include:

> (a) The amount of any payment to an alien unless said individual was, at the time he performed services, in the United States of America under color law.

5(f) Since there is no provision in the NHUCL which expressly provides that benefits will not be denied or reduced solely for the reasons specified in § 3304(a)(9)(A) of FUTA, and since it is unclear from § 282:1,N,(a) of the NHUCL whether or not the phrase "under color of law" is broad enough to encom-

pass individuals in a contiguous country with which the United States has an agreement with respect to unemployment compensation and who have been temporarily admitted into the United States for the purpose of performing services. I conclude that the NHUCL, effective January 1, 1978, has not been amended to contain a provision which meets the requirements of § 3304(a)(9)(A) of FUTA.

6. Section 3304(a)(13) of FUTA requires an approved State law, effective January 1, 1978, to provide that:

> (13) compensation shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sports seasons (or similar periods) if such individual performed such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the later of such seasons (or similar periods);

6(a) Section 282:1,O of the NHUCL, in pertinent part, provides that

> . . . Annual earnings shall be reduced by all wages for services in training preparation to participate or participation in sports or athletic events with respect to any weekly benefit amount for a week or (sic) total or partial unemployment during the period between successive sport seasons for any individual so engaged in the first of such seasons if there is a reasonable assurance of such performance in the second . . .

6(b) Section 282:1,O of the NHUCL is not in conformity with the requirements of § 3304(a)(13) of FUTA since the state law permits the use of non-sport wages with respect to a weekly benefit amount during the period between sport services even though the sport services constitute substantially all of the services performed by the individual during his base period. Section 3304(a)(13) requires that a State unemployment compensation law provide effective January 1, 1978, that under such circumstances compensation shall not be payable to such individual on the basis of any services.

7. Section 3304(a)(6)(A) of FUTA provides:

> (6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that—
>
> (i) with respect to services in an instructional, research or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract of reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms,

(ii) with respect to services in any other capacity for an educational institution (other than an institution of higher education) to which section 3309(a)(1) applies, compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms.

(iii) with respect to any services described in clause (i) or (ii), compensation payable on the basis of such services may be denied to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess, . . .

7(a) With respect to the above-quoted FUTA § 3304(a)(6)(A) and clauses (i) and (ii) thereof, the NHUCL does not provide that benefits are payable on the basis of service in the employ of the State and its political subdivisions and nonprofit organizations, in the same amount, on the same terms, and subject to the same conditions as benefits are payable on the basis of other service subject to the State law, as required effective January 1, 1978. Clause (i) requires the denial of benefits "between terms" to employees of educational institutions who performed services in a professional capacity (i.e. instructional, research, or

principal administrative capacity) under certain conditions, but only if they have a contract or a reasonable assurance to perform service in any such professional capacity in the second such academic year or term. Similarly, clause (ii) provides that compensation may be denied "between terms" to employees of academic institutions (other than institutions) of higher education) [sic] who perform services in a non-professional capacity (i.e., any capacity other than instructional, research, or principal administrative) under certain conditions, but only if they have a reasonable assurance to perform any such non-professional services in the second such academic year or term.

7(b) The New Hampshire law denies benefits between school years when an employee of an educational institution performs service in a professional capacity in the first academic year or term or other period and has a contract or reasonable assurance to perform services in a non-professional capacity in the second academic year or term or other period, and vice versa. Clauses (i) and (ii) limit application of the denials thereunder respectively to the performance of professional services in both academic years or terms and to the performance of non-professional services in both academic years or terms.

7(c) Further, the NHUCL does not conform to § 3304(a)(6)(A) of FUTA for the reason that clause (ii) of § 3304(a)(6)(A) authorizes, at the option of the State the denial of benefits to non-professional employees of lower educational institutions only between successive academic years or terms. The NHUCL, in contrast, does not limit "between terms" denial of benefits to

non-professional employees to the period between successive academic years or terms.

7(d) Still another reason why the NHUCL does not conform to § 3304(a)(6)(A) is that clause (ii) of § 3304(a)(6)(A) does not authorize "between terms" denial of benefits to non-professionals in institutions of higher education, whereas § 282:3,F of the NHUCL provides for a "between terms" denial to such persons.

7(e) Clause (iii) of § 3304(a)(6)(A) of FUTA permits, at the option of a State, denial of benefits under certain specified conditions, on the basis of services described in clauses (i) and (ii), "for any week which commences during an established and customary vacation period or holiday recess . . ." The New Hampshire law, at § 282:3,F, provides for a denial of benefits "any other time during which a school or other academic institution is not in session, between two successive academic years or terms or any other period," and is not, by its terms, limited to periods specified in the Federal law provisions. Moreover, FUTA § 3304(a)(6)(A)(iii) does not apply to non-professional employees of institutions of higher education, whereas the New Hampshire provision does so apply.

8. NHDES contends that the federal statute is not phrased in absolute terms and that substantial compliance with federal law is sufficient to avoid withholding of certification. This argument is based on a misreading of the above statutory provision. Section 3304(c) of FUTA prohibits certification under either of two conditions: either the state law fails to contain certain required provisions or the state has failed to comply substantially with any such provision during the

prior 12-month period. The first condition required strict conformity between the state law and FUTA. Substantial compliance is relevant only to the second condition, which assumes the existence of conforming state law provisions and is aimed rather at their administration. The issues in this proceeding all involve the conformity of the state law to FUTA, not questions of administration. Therefore, the concept of "substantial compliance" is not at issue in this proceeding. Moreover, even if the concept of substantial compliance were at issue, the New Hampshire Unemployment Compensation Law is clearly not in substantial compliance with respect to any of the six conformity issues.

9. The New Hampshire Unemployment Compensation Law has a benefit year, which begins on April 1 and runs through the following March 31. Under New Hampshire law, unemployment compensation benefits during such a benefit year are based on wages earned during a "base period" defined as the immediate preceding calendar year. If New Hampshire had covered state and local government service on January 1, 1978, such service, standing alone, need not be usable to establish a valid claim until April 1, 1979.

9(a) NHDES has argued that this proceeding is premature because, due to New Hampshire's benefit year, no one in New Hampshire has yet been deprived of any benefit due to the state's failure to provide the extension of coverage provided for by the 1976 Amendments. However, section 3304(c) of FUTA required a certification determination by the Secretary by October 31, 1978, based upon whether or not New

Hampshire law contains the provisions required by FUTA at that time. Because the issues in this proceeding involve the content of the state law, rather than the manner of its administration, whether or not any New Hampshire claimant has yet been deprived of benefits is immaterial.

## CONCLUSION

For the reasons set forth above, I find and conclude that the New Hampshire Unemployment Compensation Law is not in conformity with the requirements of FUTA with regard to each of the six conformity issues specified in the Notice of Hearing.

### *Findings of Fact on the Issues of Constitutionality*

From the testimony of NHDES' witnesses who spoke from actual experience in the operation of and budgeting for units of State and local government, I find the following facts from the record before me:

1. From the testimony of Joseph Acorace, Finance Officer of the City of Manchester, N.H., I find:

(a) that the city employs approximately 2400 permanent employees, some 300 to 400 seasonal and/or part-time employees, and as many as 200 substitute teachers;

(b) that none of these employees are presently covered by any sort of unemployment compensation program;

(c) that although the City has long been able to elect voluntary unemployment insurance coverage for its employees under State law, its employees have never sought such coverage in the course of negotiation and collective bargaining;

(d) that the City eliminates [sic] permanent positions only by attrition, and in the nine years during which Mr. Acorace has worked for the City, there has never been a layoff of a permanent employee;

(e) that providing unemployment insurance coverage to the City's temporary and seasonal employees will therefore have the greatest cost impact on the City;

(f) that a large part of the City's current annual budget of $55.8 million is committed to the implementation of programs already mandated by the State and/or Federal governments, leaving discretionary flexibility over only approximately 15% of the City's annual budget;

(g) that there is in the City a climate of extreme taxpayer resistance to further property tax increases which makes it difficult for the Board of Mayor and Alderman to maintain existing programs and services;

(h) that the City operates a wide range of summer educational and recreational programs for its youth, and uses seasonal employees to staff these programs;

(i) that the City's Board of Mayor and Aldermen has passed a resolution opposing Federally mandated unemployment insurance coverage for the City's employees on the basis, *inter alia*, that such coverage would affect the ability of the Board to maintain existing programs and services and require costly new staffing and record keeping practices;

(2) From the testimony of Elizabeth Puddington, currently a consultant to the New Hampshire School Boards Association and past chairman of the Amherst School Board, I find:

(a) that over 86% of the funds used to finance public education at the local level is raised by the local property tax in New Hampshire, a State which has the sixth highest local property tax per capita in the country;

(b) that most of the policy decisions in final programming and the final amount of expenditures of local school districts in New Hampshire are made by the citizens at school district meetings;

(c) that local school boards in New Hampshire must prepare their school budgets for presentation to their local taxpayers almost 18 months in advance of implementation;

(d) that any proposal made by the elected local school district officials, any kind of changes in programming or policy in terms of personnel or otherwise, must be approved by the local voters;

(e) that local school districts in New Hampshire receive practically no aid from either the State or the Federal Government in terms of significant impact on local school district expense; New Hampshire ranks last in the Nation in State revenues to public education; the State ranks 44th in Federal aid to education;

(f) that local property taxpayers in New Hampshire are extremely aware of the money that they spend on their public schools; the school district budgets consume the highest proportion of the local property taxes paid by the citizens;

(g) that in New Hampshire the local school district budget is one budget that the local property taxpayers control and examine carefully by demanding to know where the tax dollars are spent;

(h) that almost with regularity the ways and means committees or citizens committees of the

local school districts, in reviewing proposed school budgets, recommend cuts in the school budgets;

(i) that there have been several instances within the last few years where budget cuts have been proposed for various local school districts in New Hampshire, for example

(1) the school district for the city of Berlin, with a $4 million budget, is facing a $600,000 proposed budget cut in response to taxpayer unrest in the City;

(2) the school district in the city of Laconia in 1976 suffered a $400,000 budget cut the day before notification was required for reemployment of staff; this reduction in the school budget required school district officials to inform all uncertified staff and most certified staff that they would not be guaranteed reemployment for the fall semester until there were sufficient revenues to fund their positions;

(j) that New Hampshire law requires that teachers be notified of reemployment or nonreemployment for the fall semester by March 15th; many school districts in the State do not hold their annual district meetings by March 15th and thus do not have a confirmed school budget to protect themselves in the event a cut in the budget is made; the standard procedure, then for these school districts is to notify their personnel that they will only be rehired if and when funds are available;

(k) that school districts in New Hampshire have a very small percentage of their individual school budgets over which they have actual control;

(l) that the State of New Hampshire has over 100 various laws that mandate that certain serv-

ices be provided by the local school districts; approximately 75% of the budgets of most school districts is used to meet the costs of providing these required services;

(m) that some of the steps that the local school districts in New Hampshire may have to take in order to meet any additional cost of unemployment compensation include:

(1) suspending the hiring of new staff;

(2) increasing the pupil-teacher ratios to preclude the hiring of new staff;

(3) reducing the support staff workforce (e.g. nurse's aids, secretaries, non-certified staff, non-essential personnel);

(4) reducing the amount of text books and supplies that are purchased;

(5) curtailing the athletic programs and other student activities of the school districts, despite their popularity with the community; and

(6) eliminating advanced-student instructional programs and elective subjects with low enrollments, with a consequent reduction in staff as well;

(n) that, in Ms. Puddington's experience as the chief negotiator for a New Hampshire school board, collective bargaining units of school personnel have never demanded, requested or even mentioned the payment of unemployment compensation as a part of a benefits package even though unemployment compensation was available to school personnel through the local government option coverage provisions presently in New Hampshire's unemployment compensation law;

3. From the testimony of Robert Herlihy, the Director of Merchandising and Accounts of the New Hampshire State Liquor Commission, charged with making all budget projections of revenues and costs for the Liquor Commission, I find:

(a) that the Commission presently employs 500 permanent employees and has a labor pool of 264 temporary and part time workers to operate 71 liquor stores in the State of New Hampshire;

(b) that the Commission, normally the top revenue-raising government agency in the State, raised 38.5 million in revenue for the State last year;

(c) that the Commission's annual payroll expenditure for temporary employees is $800,000;

(d) that the Commission's labor pool of temporary and part-time workers during the summer consists of college students, housewives, teachers, and people who are coming into the employment field looking for part-time work to finance their vacations;

(e) that the Commission's labor pool of temporary and part-time workers in the wintertime and during the Christmas season consists primarily of housewives and some high school students;

(f) that the Commission requires a labor pool of part-time workers because of the seasonal and even weekly fluctuation in the volume of the Commission's business, and that this system is cost-effective compared to the overstaffing during non-peak periods which would accompany exclusive use of permanent employees;

(g) that the layoff rate among permanent, classified employees of the Commission is less than 2%;

(h) that in computing the potential cost to the Commission of providing unemployment compensation benefits to its employees under the 1976 Amendments, Mr. Herlihy concentrated on the temporary, part-time workers employed by the Commission;

(i) that housewives and other temporary workers, who are typically employed as cashiers on a part-time basis by the Commission during high-volume weekend periods, can earn up to $1,800 a year with the Commission, which will place them over the $1,200 annual qualifying wage for unemployment compensation benefits and will permit them to seek unemployment benefits when they are not employed by the Commission;

(j) that the Commission will be liable for a portion of the costs of unemployment benefits paid to those temporary, part-time workers with the Commission who build up their wage credits, and thus the amount of unemployment compensation that they can receive, through employment at a second or subsequent job with another employer;

(k) that college students employed by the Commission during summer vacation can earn up to $2,000 from the Commission during the summertime, which will entitle them to collect unemployment compensation during subsequent vacation periods;

(l) that the cost to the Commission of providing unemployment compensation benefits to the employees of the Commission under the contributory tax methods of financing is likely to be $75–80,000 annually, with a potential cost under this financing method of $120,000 annually;

4. From the testimony of Danial Durgin, the Business Administrator for Supervisory Union 16 of Exe-

ter, New Hampshire, and President of the New Hampshire School Administrators' Association, I find:

(a) that, based on the contributory method of financing unemployment compensation benefits, the annual cost to the School District of Exeter of providing unemployment benefits to its school personnel under the 1976 Amendments will be over $32,000;

(b) that the local property tax impact of an additional $32,000 annual expenditure by the School District of Exeter is a tax rate increase of $.20–$.25;

(c) that under the reimbursement method of financing unemployment benefit costs, local school districts will also be liable on whole or in part for the cost of benefits paid to school personnel who voluntarily quit, obtain another job and subsequently become eligible for unemployment benefits;

(d) that in the last 9 or 10 years bargaining units for the school personnel in Supervisory Union 16 have never sought the payment of unemployment compensation benefits by the local school districts despite the existence of the local government optional coverage provisions under New Hampshire's present unemployment compensation law and the fact that the payment of unemployment benefits is a negotiable item in collective bargaining sessions with the school districts.

5. From the testimony of Walter F. Mead, the Assistant Commissioner of the Department of Public Works and Highways of the State of New Hampshire, I find:

(a) that the Highway Department of the State of New Hampshire is funded from a dedicated

highway fund into which highway user revenues (e.g. motor vehicle registration fees, drivers license fees and gasoline taxes) are deposited;

(b) that the mission of the Highway Department is to maintain the State system of 4,200 miles of highways, to construct and reconstruct the required mileage, to supplement that which is now there, both under the Federal aid highway program as well as State programs, and to administer and carry out certain aid programs for local towns for their 10,000 miles of road;

(c) that the Department of Public Works and Highways employs 1795 permanent classified workers;

(d) that between September 1977 and September 1978, the Department of Public Works and Highways employed 1340 part-time, seasonal and full-time temporary employees, including college students, who performed a variety of necessary functions for the Department (*e.g.* staffing of rest areas on highways, snow removal, construction, design and maintenance work);

(e) that in fiscal year 1978 the total payroll for all full-time temporary, seasonal and part-time workers employed by the highway section of the Department was $1.903 million;

6. From the affidavit of Arthur Fowler, the Comptroller of the State of New Hampshire, I find:

(a) that the State of New Hampshire employs approximately 2,200 temporary employees in various departments and agencies at the total annual payroll expenditure of $15,000,000;

(b) that the annual cost to the State of New Hampshire under the reimbursement method of

financing unemployment benefits could be as high as 4.3 million;

(c) that the annual cost to the State under the contributory tax method of financing unemployment benefits to these temporary employees will be approximately $300,000;

7. From the affidavit of Eldon R. Buswell, the Deputy Commissioner of the Department of Employment Security of the State of New Hampshire, I find that if unemployment compensation coverage is extended to the temporary and part-time employees employed by this Department, the additional administrative costs to the Department will range from $75,000 to $150,000 annually.

8. From the affidavit of Robert E. Whalen, the Commissioner of Health and Welfare for the State of New Hampshire, I find that the Department presently employs approximately 500 temporary employees and that approximately 34 employees per year will be eligible for unemployment compensation benefits at an annual cost of $30,528 under the challenged provisions of the 1976 Amendments.

9. From the affiadvit of Charles Barry, the Director of the New Hampshire Fish and Game Department, I find that providing unemployment compensation benefits to the temporary workers employed by the Department under the challenged provisions of the 1976 Amendments will require an annual expenditure by the Department of $4,830 for fiscal years 1978 and 1979.

10. Under the challenged provisions of the 1976 Amendments, every proposal to establish new or ex-

pand existing government programs and services of New Hampshire and its local governments will have to consider as one aspect of any such program or expansion the potential cost of unemployment compensation benefits that a new or expanded government service or program will create for the State or its local governments.

11. Both parties introduced expert testimony on what they perceive to be the additional cost to New Hampshire as a result of the 1976 Amendments for FY 78, 79 and 80.

12. Mr. Lennox L. Moak, a consultant to Blyth, Eastman Dillon Co. and other institutions testified on behalf of New Hampshire. Mr. Moak was Director of Finance for the City of Philadelphia in 1952, 1954 and again from 1972 to 1977. He holds a bachelor's degree in Mathematics from Southwest Texas Teachers College and a master's degree in Governmental Administration from the University of Texas. Mr. Moak has written or supervised about 500 reports over the past 40 years. He has also authored six books in the field of public finance dealing with budgeting, capital programming, sales tax administration, debt administration and general local government finance.

13. Mr. Moak testified that he was generally familiar with the Federal-State Unemployment Compensation Program, although he was not an expert in unemployment compensation. To prepare his testimony, Mr. Moak visited New Hampshire for three days to gather financial and statistical data. From this data, he prepared a paper (New Hampshire Ex. D) in which he described what he believed to be the "indicated" addi-

tional costs should unemployment insurance coverage be expanded in New Hampshire in accordance with the 1976 Amendments.

14. The Department of Labor also provided expert testimony on the cost issue from Dr. James D. Van Erden. Dr. Van Erden is currently employed by the U.S. Department of Labor Employment and Training Administration, Unemployment Insurance Service Division, Actuarial Services, as a supervisory Actuary.

15. Dr. Van Erden holds a bachelor's degree in Economics from Weber State College, and a master's degree in Applied Statistics and a Ph.D. in Economics from the University of Utah. He has authored several publications in the field of Economics, statistics and cost forecasting of unemployment insurance.

16. His current duties include forecasting costs of unemployment insurance programs for the Department of Labor and Congress as well as other groups interested in the cost of unemployment insurance programs. Based on statistical data available to him in the course of his employment, Dr. Van Erden also made a cost projection for New Hampshire should the 1976 Amendments be implemented. (DOL Ex. 21).

17. Based upon my review of the documentary evidence and opinions offered by these experts, I find and conclude that the projections and estimates of Dr. Van Erdern are to be accorded the greater weight. Based upon his opinion, I find:

a. Additional covered employment (CE) which would result from the extension of unemployment compensation coverage to all New Hampshire

state and local government employees has been estimated as follows:

| | |
|---|---|
| FY 1978 | 35,148 |
| FY 1979 | 37,609 |
| FY 1980 | 40,421 |

b. The average weekly benefit amount (AWBA) payable to newly covered New Hampshire state and local government employees has been estimated as follows:

| | |
|---|---|
| FY 1978 | $66.38 |
| FY 1979 | 71.03 |
| FY 1980 | 76.00 |

c. The insured unemployment rate (IUR) for a specified period is defined as the number of individuals filing claims divided by covered employment. In New Hampshire, the IUR for the regular private sector program has dropped significantly in recent years, following a nationwide pattern of economic recovery from the 1975 recession. The actual data is as follows:

| | |
|---|---|
| CY 1975 | 7.5% |
| CY 1976 | 3.3% |
| CY 1977 | 2.2% |

(d) The New Hampshire IUR for the second calendar quarter of 1978 was 1.05%.

(e) Based on the IUR described in paragraph 17(c) and generally accepted economic projections for the next three years, the New Hampshire IUR for those years has been estimated as follows:

| | |
|---|---|
| FY 1978 | 1.1% |
| FY 1979 | 1.0% |
| FY 1980 | 1.0% |

(f) Because the IUR includes all claims, not just those on which compensation is paid, it should be multiplied by .8, the historical ratio between weeks compensated and weeks claimed.

(g) Historically the uninsured unemployment rate for state and local government employees has been significantly lower than that for the regular (private sector) UI program. Nationwide, the ratio between the IUR for covered state and local employees and the IUR for the regular program has averaged .26 over the past several years.

(h) Multiplying the above factors yields the following USDOL estimates of the cost of the extension of coverage to New Hampshire state and local government employees:

| | FY 1978 | FY 1979 | FY 1980 |
|---|---|---|---|
| Additional CE | $35,148 | $37,609 | $40,241 |
| IUR | 1.1% | 1.0% | 1.0% |
| weeks/year | 52 | 52 | 52 |
| weeks comp/ weeks claimed | .8 | .8 | .8 |
| S&L IUR/IUR | .26 | .26 | .26 |
| AWBA | 66.38 | 71.03 | 76.00 |
| Total Cost Estimate | $227,585 | $288,935 | $330,787 |

(i) Considering the transitional provisions of the 1976 Amendments, the best estimate of actual costs to New Hampshire for the extension of coverage to state and local government employees is the following:

| | |
|---|---|
| FY 1978 | $ 0 |
| FY 1979 | 144,468 |
| FY 1980 | 330,787 |

**Recommendation**

Based upon the foregoing findings of fact and conclusions of law, it is recommended that the Secretary of Labor determine that, the state of New Hampshire

has failed to amend its Unemployment Compensation Law: (1) so that it contains, effective January 1, 1978, each of the provisions required to be contained therein by reason of the enactment of the Unemployment Compensation Amendments of 1976 (Public Law 95-566, approved October 20, 1976; 90 Stat. 2667, *et seq.*) and Title III of the Emergency Unemployment Compensation Extension Act of 1977 (Public Law 95-19, approved April 12, 1977, 91 Stat. 39, 43, *et seq.*); and (2) so that it no longer contains the provisions specified in section 3304(a) of the Internal Revenue Code of 1954, 26 U.S.C. 3304(a) as more fully described herein.

/s/_____

ROBERT G. MAHONY
*Administrative Law Judge*

Dated: October 13, 1978
Washington, D.C.

RGM:jps

**SERVICE SHEET**

State of New Hampshire
Conformity Case

Copies of the foregoing RECOMMENDED DECISION were sent to the parties listed this day OCT 13, 1978.

*CERTIFIED MAIL—RETURN RECEIPT REQUESTED*

Mr. Ray Marshall
Secretary, U.S. Department of Labor
Suite S-2018, NDOL
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Charles Raymond, Esq.
Office of the Solicitor
U.S. Department of Labor
Suite N-2101, NDOL
200 Constitution Avenue, N.W.
Washington, DC 20210

Rhyne & Rhyne
Suite 800
1000 Connecticut Avenue, N.W.
Washington, DC 20036

Edward Smith, Esq.
General Counsel
New Hampshire Department of
Employment Security
32 South Main Street
Concord, NH 03301

Ms. Mary Mullaney
U.S. Catholic Conference
Office of the General Counsel
1312 Massachusetts Avenue, N.W.
Washington, DC 20005

George Kaufman
Attorney at Law
2101 L Street, N.W.
Washington, DC 20037

Mr. Richard M. Flynn
Business & Industry Association
of New Hampshire
23 School Street
Concord, NH 03301

/s/_____
CAROL J. READY

## APPENDIX D

**UNITED STATES DISTRICT COURT FOR THE COURT OF APPEALS FOR THE FIRST CIRCUIT**

U.S. COURT OF APPEALS
FILED IN CLERK'S OFFICE
May 21, 1980

FOR THE FIRST CIRCUIT
Civil Action
No. 78-1564

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
AND THE STATE OF NEW HAMPSHIRE,

*Appellants*

*v.*

THE HONORABLE E. RAY MARSHALL,
SECRETARY OF LABOR OF THE UNITED
STATES; AND THE UNITED STATES
DEPARTMENT OF LABOR,

*Appellees*

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that The State of New Hampshire, Department of Employment Security; and The State of New Hampshire, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action of Febuary 20, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254.

THE STATE OF NEW HAMPSHIRE
GREGORY H. SMITH, ACTING
ATTORNEY GENERAL, BY
JAMES E. MORRIS,
ASSISTANT ATTORNEY GENERAL

/s/_____
JAMES E. MORRIS, ESQUIRE

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EMPLOYMENT SECURITY
EDWARD F. SMITH
GENERAL COUNSEL

/s/_____
EDWARD F. SMITH, ESQUIRE

**APPENDIX E**

**OFFICE OF THE CLERK**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

Dana H. Gallup
Clerk

1606 John W. McCormack
Post Office and Courthouse
Boston, Mass. 02109
(617) 223-2888

July 10, 1980

Michael Rodak, Jr., Esquire
Clerk, Supreme Court of the
United States
Supreme Court Building
Washington, D.C. 20543

Re: No. 78-1564. State of N.H. Dept. of Employment Security, et al. v. F. Ray Marshall, Secy. of Labor, Etc.

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Dear Mr. Rodak:

On May 21, 1980, I sent to you a document which purported to be a notice of appeal. Through error on our part, the notice of appeal was erroneously stamped May 21, 1980. The notice of appeal was, in fact, filed in our office on May 20, 1980, and should have been stamped with that date.

I would appreciate it if you would correct our stamped date in order that it may reflect the true filing date.

Would you kindly acknowledge receipt of the above on the enclosed copy of this letter.

Very truly yours,
DANA H. GALLUP, CLERK.
By: /s/ _____
FRANCIS P. SCIGLIANO
*Chief Deputy Clerk*

FPS: lam

---

cc: James E. Morris, Esquire, Office of the Attorney General, Concord, N.H. 03301
Charles S. Rhyne, Esquire, Rhyne & Rhyne, 100 Connecticut Ave., N.W. Suite 800, Washington, D.C. 20036
Edward F. Smith, Esquire, General Counsel, 32 So. Main St., Concord, N.H.
George Kaufman, Esquire, 2101 L St., N.W., Washington, D.C.
Robert T. Duffy, Esquire, Tax Division, Dept. of Justice, Washington, D.C. 20530
Charles G. Cleveland, Esquire, Nix & Wendell, 127 Main St., Nashua, N.H. 03060

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